

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 452 of 1989

with

CRIMINAL APPEAL No 608 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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CHHIBUBHAI D KOLI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 452 of 1989

MR DD VYAS for Petitioners

Mr.Y.F. Mehta,

Additional PUBLIC PROSECUTOR for the Respondent.

2. Criminal Appeal No 608 of 1989

PUBLIC PROSECUTOR for Petitioners

MR DD VYAS for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE H.L.GOKHALE

Date of decision: 07/01/97

ORAL JUDGEMENT : (Per N.J. Pandya, J.)

In all, three accused were facing trial before the learned Additional Sessions Judge, Valsad, at Navsari, for offences punishable under Section 302 read with Section 114 of the Indian Penal Code, in respect of deceased Ravindra and in respect of injured witness Naresh for offence punishable under Section 325 IPC, attributed to accused No.3.

The learned trial Judge, by his judgment dated

15.7.1989, was pleased to convict accused Nos. 1 and 2 for offences punishable under Section 302 read with Section 115 IPC and was pleased to acquit accused No.3.

The incident occurred on 3.3.1988, at about 9.15 p.m., in the house of accused No.1. There is a slight controversy as to the exact location of the place of the incident, because, indisputably, the house belonging to accused No.1 was shared by eldest son of the complainant. In the front portion of the house, Uttambhai, son of the complainant, was staying and in the remaining part, towards west, accused No.1, with his family, was staying.

The incident happened on the day of Holi festival and fire was lit before the incident occurred. According to the complaint given, which has been exhibited at Exhibit 15, page 107, by Khushalbhai, father of the deceased, wife of the eldest son Uttambhai came to the house of the complainant, informing them that the accused and his sons are creating disturbance and are causing danger all around. Therefore, the complainant, along with his sons, Ravindra and Naresh, came to the place and tried to intervene. However, before they could do so, according to the complaint, accused No.1 caught hold of deceased Ravindra and thereby facilitated for the accused No.2 to give fatal blow with a wooden staff, known as "Khandaniya".

Ravindra fell down immediately and before he could be brought to a hospital, he had already died. Complaint was lodged by 11.00 p.m. at Gandevi Police Station and the investigation started.

The complainant has been examined as P.W.2, Exhibit 17, page 95, followed by eye witness Naresh, P.W.5, Exhibit 24, page 123. The last eye witness is Jamnaben, P.W.6, Exhibit 25, page 133. It is this Jamnaben, who is said to have informed the complainant about the activity of the accused.

Learned Advocate Shri Vyas has pointed out from the cross-examination of the complainant himself that he gives a virtual go-by to the version set out in the complaint, and, on the contrary, shifts the incident from the front part of the house to the back side, which is the area occupied by the accused party. It is also admitted by the complainant that the tube light was broken and the ceiling fan was found twisted. There was damage to the wall of the house also. Unfortunately for the defence, this fact is not borne out by the Panchnama of the scene of offence, Exhibit 22. The Panchnama, on

the contrary, clearly indicates that the incident happened in the front part of the house, which was kept by the elder brother of the deceased, i.e., the eldest son of the complainant. No damage to the wall is indicated in the Panchnama, nor is there any damage to the electrical fittings recorded in it.

Had there been damage to the electrical fittings, it would have resulted into darkness and, therefore, the probable defence, taken in their further statement under Section 313 as well as indicated during the cross-examination of witnesses, would have assumed great importance. The explanation is that when nine persons or so from the complainant's side, while chasing one of the brothers of accused Nos. 2 and 3, had entered the house of the accused and in the altercation that followed, electrical fittings having been damaged, in the darkness, the scuffle continued. Therefore, who hit whom, with what, was not possible to make out and if in the process Ravindra received fatal injuries, the accused would not know anything about it and, therefore, they are not responsible for the same.

However, in absence of any fact recorded in the Panchnama, with regard to the electrical fittings, in our opinion, an admission, on the part of the complainant with regard to damage to the fittings, would be of no consequence. The other two eye witnesses stoutly denied the suggestion of damage to the electrical fittings. All the witnesses consistently maintained that it was accused No.2, who had given the said fatal blow to the deceased.

The net result is that due to extensive cross-examination of the witnesses, the so-called abetment on the part of accused No.1 is very much weakened, if not wholly ruled out. The appeal is filed by both the accused and, in our opinion, so far as accused No.1-appellant No.1 is concerned, he has been wrongly convicted with the aid of Section 114 IPC. Appeal filed by him is, therefore, accepted.

So far as the appeal against conviction filed by accused No.2 is concerned, we will now proceed to consider the alternative plea urged by learned Advocate Shri Vyas.

The alternative plea is that if the explanation offered in the further statement is not accepted and though the explanation is not given for the sake of it, but is, in fact, made out by the material brought on record by way of cross-examination of witnesses, then, in

the alternative, it is very strongly urged that the blow was not given with an intention to kill, but, in the aforesaid background, it was clearly an act of reacting to the situation and, therefore, it be considered as an unintentional act and as a result, the conviction should be altered from under Section 302 IPC to the one under Section 304 Part II. We accept this submission and accordingly, alter the conviction from offence under Section 302 IPC to Section 304 Part II.

With regard to the sentence, looking to the aforesaid background of the case, five years' imprisonment would serve the purpose. Accused-Appellant No.2 is on bail. He is, therefore, ordered to surrender and time is granted upto 24th of February, 1997. The period already undergone, either as an undertrial prisoner or as a convict in jail, shall, of course, be given credit of while reckoning the said period of imprisonment awarded by us, which is five years' rigorous imprisonment.

Appeal of appellant-accused No.1 is allowed and he is acquitted. He being on bail, his bail bond shall stand cancelled. For accused No.2, the appeal is partly allowed and the conviction is altered to that of Section 304 Part II and he is awarded five years' rigorous imprisonment, with a direction to give credit to the period that he has undergone, either as undertrial prisoner or as a convict in jail.

This leaves us with Appeal No.608 of 1989 filed by the State against accused No.3. There is no evidence whatsoever worth the name to link him with the incident and under the circumstances, this appeal is rejected.

(apj)